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REMARKS

Claims 301, 303, 304, 307-310, 322-333 are pending in the application.

Claim Rejection 35 U.S.C. § 112, second paragraph

By this Reply Claims 301, 310, 322, 329, and 330 have been amended to more particularly point out and distinctly claim the current subject matter. Applicant asserts such amendments remove claim indefiniteness and thus, respectfully requests that the rejection under 35 U.S.C. 112, second paragraph be withdrawn.

Applicant respectfully requests the Office clarify exactly what language the Office is objecting to with respect to Claims 307-309, 323-328, and 331-333 such that the Applicant may amend or offer arguments rebutting the Office's position. Removal of the rejection is respectfully requested.

Removal of the pending rejection to Claims 301, 303-310, and 322-333 under 35 U.S.C. §112, second paragraph is respectfully requested and allowance solicited.

Claim Rejection 35 U.S.C. § 102

Claims 301, 303, 304, 307-310 stand rejected either as anticipated under 35 U.S.C. §102(b) or as obvious under 35 U.S.C. §103(a) over Forber et al., (sic) Forberg et al., (DD 138273) hereinafter Forberg et al. Applicant respectfully disagrees. References in this Reply refer to the translated summary provided.

Claims 301, 303, 304, 307-310 have been rejected under 35 U.S.C. §102(b) as anticipated by Forberg et al. Applicant traverses. In order to anticipate a claim for a patent, “a single prior source must generally contain all of the essential elements of the claim.” *W.L. Gore & Assoc. v. Garlock, Inc.*, 220 USPQ 303, 313 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984). Further, the prior art reference must disclose each element of the claimed invention arranged as in the claim.” *Lindermann Maschinenfabrik GmbH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 221 USPQ 481, 485 (Fed. Cir. 1984) (citing *Connell v Sears, Roebuck & Co.*, 722 F.2d 1542, 220 USPQ 193 (Fed. Cir. 1983)) (emphasis added). Anticipation cannot be established when “the prior art is lacking or missing a specific feature or the structure of the claimed invention.” *Lindermann Maschinenfabrik GmbH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 221 USPQ 481, 485 (Fed. Cir. 1984) (citing *Connell v Sears, Roebuck & Co.*, 722 F.2d 1542, 220 USPQ 193 (Fed. Cir. 1983)) (emphasis added). Under such circumstances, reference to additional prior art is necessary. If more than one reference is required to establish unpatentability, anticipation according to Section 102 cannot be found, and patent validity must be evaluated in terms of obviousness under Section 103. *Continental Can Co. USA v. Monsanto Co.*, 948 F.2d 1264, 20 USPQ 2d 1746, 1748 (Fed. Cir. 1991).

Here, the aforementioned test for anticipation is not satisfied. Forberg et al. does not contain all of the elements of Claims 301, 303, 304, and 307-310. Forberg et al. claims a

method for manufacturing of an effective premix for medicinal fodder with the source of antibiotic being a pure base, a salt, or a derivative thereof. In contrast, the invention in controversy claims a method for preparing a medicated supplement with the source of antibiotic being from an organism in the fermentation medium and in the form of uncompacted granules with substantially uniform particle size. Applicant has amended Claim 301 to further distinguish the present invention. Applicant asserts that this amendment overcomes the 35 U.S.C. §102(b) rejection and claims are in the condition for allowance. In particular, Forberg et al. discloses the inclusion of antibiotics in the form of the pure base, a (sic) salt or of a derivative. Forberg et al. therefore fails to teach a method including fermentation solids including antibiotic formed from a fermentation medium.

In addition, Applicant argues that the claimed elements in the present invention are arranged differently than those disclosed in Forberg et al. Forberg et al. lacks (1) culturing of an organism producing an antibiotic in fermentation medium to produce a fermentation broth; and (2) producing granulated fermentation solids comprising uncompacted granules having a substantially uniform particle size wherein the granules have an antimicrobial concentration of at least 10 g/lb. As such, Applicant respectfully requests that the 35 U.S.C. §102(b) rejection be removed and Claims 301, 303, 304, and 307-310 allowed.

Claim Rejection 35 U.S.C. § 103(a)

As stated above, Claims 301, 303, 304, 307-310 stand rejected either as anticipated under 35 U.S.C. §102(b) or as obvious under 35 U.S.C. §103(a) over Forber et al., (sic) Forberg et al., (DD 138273) hereinafter Forberg et al. The rejections are respectfully traversed.

The Office states that Forberg et al. teaches the use of waste or secondary fermentation products by reference to the following statement “the economically feasible manufacturing of an effective premix by adding a waste product or secondary material of the fermentation

is not known.” Applicant respectfully disagrees with the Office’s interpretation of said statement.

Applicant argues that both case law and public policy support the conclusion that Forberg et al. does not render the invention in controversy obvious. First, if one were to consider Forberg et al. in its entirety, one would conclude that such reference teaches away from the use of fermentation products as the source of antibiotic. Instead, Forberg et al. teaches utilization of a pure base, salt, or derivative thereof. The purpose of Forberg et al. is to disclose a method for manufacturing an effective premix utilizing antibiotics in the form of a pure base, of a salt or of a derivative thereof. Forberg et al. fails to teach a method employing antibiotic formed via fermentation without the addition of additional material, Forberg et al. only states that it is unknown if such a process would work. Therefore, Forberg et al. does not teach the use of secondary material of the fermentation when manufacturing an effective premix.

Second, Forberg et al. fails to enable one of ordinary skill in the art to use secondary fermentation products to manufacture an effective premix. Precedent set by the Federal Circuit Court establishes that a reference must be enabling in order to be considered prior art. As stated in *Motorola Inc. v Interdigital Tech. Corp.*, 121 F3d 1461, 1471, 43 USPQ 2d 1481, 1489, “in order to render a claimed apparatus or method obvious, the prior art must enable one skilled in the art to make and use the apparatus or method.” *Motorola Inc. v Interdigital Tech. Corp.*, 121 F3d 1461, 1471, 43 USPQ 2d 1481, 1489 (Fed. Cir. 1997). The Court has further ruled that “failed attempts or attempts that used different elements was not enough” to satisfy the enablement requirement. *Motorola Inc.*, 121 F3d at 1471, 43 USPQ 2d at 1489. Here, such a standard has not been met. Forberg et al. does not enable one to manufacture an effective premix by the use of secondary fermentation products. All Forberg et al. does is state that the ability to do such a process is unknown. Therefore, at

the most, Forberg et al. invites others to explore this possibility.

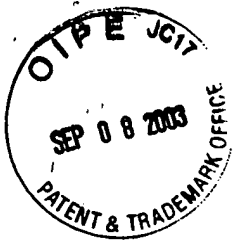
Third, the invitation to explore by Forberg et al. does not render the invention in controversy obvious because prior case law has established that an invention is not obvious where prior art only provides “invitation to explore” even though prior art could theoretically explain the invention. *Ex parte Obukowicz*, 27 USPQ 2d 1063 (B.P.A.I. 1992). As stated by the board in *Ex parte Obukowicz*, 27 USPQ 2d at 1063, a statement of the type that gives only general guidance and is not at all specific as to the particular form of the claimed invention and how to achieve it, is “an invitation to scientists to explore a new technology that seems a promising field of experimentation.” *Ex parte Obukowicz*, 27 USPQ 2d at 1063. Such invitation “may make an approach obvious to try but does not make the invention obvious.” *Id.* Applicant argues that Forberg et al. not only fails to give specific information about how to use secondary fermentation products to manufacture an effective premix, but fails to give even general guidance on how to perform such method. Again, all Forberg et al. states is that the ability to use such products in forming an effective premix is unknown. Therefore, Forberg et al. should not be held to render applicant's invention obvious.

Fourth, the Federal Circuit has established that by definition more than one source of information is necessary to support an obviousness rejection. Accordingly, “if it is necessary to reach beyond the boundaries of a single reference to provide missing disclosure of the claimed invention, the proper ground is not Section 102 anticipation, but Section 103 obviousness.” *Scripps Clinic & Research Found. v. Genentech Inc.*, 927 F.2d 1565, 1577, 18 USPQ 2d 10001, 1010 (Fed. Cir. 1991). Here, only one reference, Forberg et al., is cited for the basis of a Section 103 obviousness rejection. One explanation for this is that the Examiner is relying upon personal knowledge. Applicant traverses the Office's assertion that “However, Forbes does in fact set forth use of waste products or secondary

fermentation, alluded to as not before known (p.4, first full paragraph). Present action, page 3. As argued previously, Forberg et al. does not teach adding secondary fermentation products. Instead, Forberg et al. teaches that purified forms including salts and derivatives are to be utilized to achieve the desired effectiveness. If personal knowledge is being utilized, Applicant respectfully requests an affidavit under 37 C.F.R. Section 1.107 (b) with respect to any rejection based on such knowledge. Such affidavit will allow Applicant to amend or offer arguments rebutting the Office's position. Further, it is noted that the Office's search has not cited or revealed any references supporting the Office's contention. Consequently, Applicant asserts the (believed) personal knowledge is not well-known.

Regarding the Office's statement that "[W]e find the instant to provide a granulate or pellet by methods precluding imperfections (p.4, explanation-paragraph), indeed would produce, using the fluidized bed processing (p.5) substantially uniform granules." Applicant traverses. The cited passage of Forberg et al. (page 4) indicates that the pellets are generally free of defects, this is not the recited characteristic of substantially uniform particle size. If personal knowledge is being utilized, Applicant respectfully requests an affidavit under 37 C.F.R. Section 1.107 (b) with respect to any rejection based on such knowledge. Further, it is noted that the Office's search has not cited or revealed any reference which supports the Office's contention that fluidized bed processing would produce substantially uniform granules. Consequently, Applicant assert that Forberg et al. fails to teach the asserted limitation.

Removal of the pending rejection to Claims 301, 303, 304, 307-310, and 322-333 under 35 U.S.C. §103(a) is respectfully requested and allowance solicited.



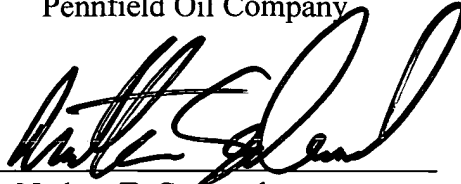
CONCLUSION

In light of the forgoing, reconsideration and allowance of the claims is earnestly solicited.

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